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No. 1132

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

BETTY SOLOMON,

Petitioner,

vs.

LIQUOR CONTROL COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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BETTY SOLOMON,

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LIQUOR CONTROL COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner, Betty Solomon, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered in the above entitled case on December 1, 1965. Rehearing was denied on December 22, 1965.

CITATIONS TO OPINIONS BELOW

The decision of the Liquor Control Commission of the State of Ohio is unreported and is printed in Appendix D hereto, page 28a. The opinion and order of the Court of Common Pleas of Franklin County, Ohio, are unreported and are printed in Appendix C, at page 23a. The opinion and journal entry of the Court of Appeals of Franklin County are unreported and are printed in Appendix B, at page 11a. The opinion of the Supreme Court of Ohio, printed in Appendix A, at page 1a, is reported in 4 Ohio St. 2d 31 (1965).

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on December 1, 1965, and rehearing was denied on December 22, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. May state officials, such as state liquor inspectors, acting without a search or body warrant and without probable cause, search, seize and confiscate bottles of liquor on the premises of a permit holder solely for the purpose of obtaining evidence of a violation of a state statute?

2. Is evidence which has been obtained by an unreasonable search and seizure and thus must be excluded in a criminal case likewise to be excluded in an administrative proceeding by a state to suspend or revoke the permit of a licensee to engage in the business of selling alcoholic beverages?

3. Is Section 4301.68, Revised Code, so vague, indefinite and uncertain as to deprive petitioner of her rights of due process under the Fourteenth Amendment of the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Section 4301.10, Revised Code of Ohio, provides in pertinent part:

> "Section 4301.10. Powers and duties of department of liquor control.
>
> (A) The department of liquor control shall:
>
> * * *
>
> (6) Inspect, upon demand, the books, accounts, records, memorandums, and place of business of any person subject to Chapters 4301. and 4303. of the Revised Code or the laws relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquor, and the sale of alcohol;
>
> (7) Delegate to any of its agents or employees any power of investigation which the department possesses and the powers of police officers with respect to the enforcement of any of the penal laws relating to beer and to intoxicating liquor, provided that except in his report to the department or when called upon to testify in any court or proceeding, no such agent or employee shall divulge any information acquired by him with respect to the transactions or the business of any person while acting as such agent or employee, and if

he does divulge such information he shall be disqualified forever from acting as agent or in any other capacity under the appointment or employment of the department;

(8) Exercise all other powers expressly or by necessary implication conferred upon the department by Chapters 4301. and 4303. of the Revised Code, and all powers necessary for the exercise or discharge of any power, duty, or function expressly conferred or imposed upon the department by such chapters."

Section 4301.66, Revised Code of Ohio, provides:

"Section 4301.66. Obstructing search of premises prohibited. (GC § 6064-63)

"No person shall hinder or obstruct any agent or employee of the department of liquor control, or any officer of the law, from making inspection or search of any place, other than a bona fide private residence, where intoxicating liquor is possessed, kept, sold, or given away."

Section 4301.68, Revised Code of Ohio, provides:

"Section 4301.68. Prohibition against sale or possession of diluted liquor and refilled containers. (GC § 6064-68)

"No person shall sell, offer for sale, or possess intoxicating liquor in any original container which has been diluted, refilled, or partly refilled."

Section 4301.99, Revised Code of Ohio, provides in pertinent part:

"Section 4301.99. Penalties.

* * *

(E) * * *

"Whoever violates division (B) of Section 4301.58 or section 4301.59, 4301.60, 4301.66, or 4301.68 of the Revised Code shall be fined not less than one hundred nor more than one thousand dollars or imprisoned not less than ten days nor more than six months, or both. . . ."

STATEMENT OF THE CASE

This matter had its origin in an administrative proceeding before the Liquor Control Commission of the State of Ohio when the petitioner, operating Brooksy's Bar in Cleveland, Ohio, under a Class D-5 permit issued by the Department of Liquor Control, State of Ohio, was charged with a violation of Section 4301.68, Revised Code, in the following language:

> "On August 14, 1961, you did possess in and upon the permit premises, intoxicating liquor in an original container which had been diluted, refilled, or partially refilled—in violation of the provisions of the Liquor Control Act." (Appendix E, at page 31a)

The violation of Section 4301.68, Revised Code, also is made a criminal offense by Section 4301.99(E), Revised Code.

Petitioner, because of the brevity of the record, has appended hereto, as Appendix E, the proceedings and testimony before the Liquor Control Commission on June 20, 1963.

Two days prior to the hearing before the Commission, petitioner filed a motion for an order directing the Director of Liquor Control to return certain property seized on August 14, 1961, by agents of the Department of Liquor Control from the premises of the petitioner and for the suppression of the evidence taken by the agents from the consideration of the Commission at the time of the hearing on the basis of the exclusionary rule enunciated by this Court in *Mapp v. Ohio*, 367 U.S. 643 (1961). The Commission overruled the petitioner's said motion. Appendix E, at page 40a.

Petitioner renewed her motion to return and suppress the evidence at the time of the hearing prior to the taking of evidence and at the close of respondent's case. Appendix

E, at pages 31a-32a, 38a. Once again, the Commission overruled the petitioner's motion (Appendix E, at page 38a), found that the charges placed against petitioner were well-taken and revoked the petitioner's Class D-5 liquor permit. Appendix D, at page 28a. Although the opinion of the Ohio Supreme Court recites that petitioner did not object to the testimony of the respondent's sole witness, the state chemist (4 Ohio St. 2d at page 33), the petitioner did specifically "move the testimony of [the chemist] be stricken" on the basis of *Mapp*, supra, which motion was overruled by the Commission. Appendix E, at page 38a.

Petitioner appealed to the Court of Common Pleas from the decision and order of the Commission overruling petitioner's motion to return and suppress the evidence and from the decision and order of the Commission revoking petitioner's Class D-5 liquor permit. The Court of Common Pleas, on December 10, 1963, affirmed the order and decision of the Commission revoking the petitioner's liquor permit and overruling petitioner's motion to return and suppress the evidence, holding that *Mapp*, supra, was "no support for [petitioner's] motion." Appendix C, at page 24a.

Petitioner then perfected an appeal to the Court of Appeals of Franklin County and, in the course of that appeal, renewed her contention that the property seized by the agents of the Department of Liquor Control should be returned and suppressed on the basis of *Mapp*, supra; petitioner further raised the question that Section 4301.68, Revised Code, was invalid, being ambiguous, indefinite and unreasonable. On October 28, 1964, the Court of Appeals, in a two to one decision, reversed the judgment of the Court of Common Pleas, vacated the order of the Commission and remanded the cause to the Commission "for further proceedings according to law and the decision of this Court" for the reason that the language of Section 4301.10, Revised

Code, did not authorize the "seizure and confiscation" of petitioner's property and that, therefore, "the seized property" should not have been "admitted into evidence in a hearing before the commission." Appendix B, at page 20a. In the course of its decision, the Court of Appeals held (1) that "*Mapp v. Ohio* (1961, 367 U.S., 643) is of no help to the appellant permit holder in the instant case. That case dealt with a criminal matter and concerned a police officer who forcibly entered a private residence without a warrant and obtained evidence upon which conviction was based." (Appendix B, at page 13a); and (2) that there was "nothing ambiguous about" Section 4301.68, Revised Code. Appendix B, at page 15a.

The respondent herein thereupon filed a motion with the Supreme Court of Ohio for an order directing the Court of Appeals to certify its record to the Supreme Court, which motion was allowed on February 10, 1965. On December 1, 1965, the Supreme Court reversed the judgment of the Court of Appeals and affirmed the judgment of the Court of Common Pleas. Appendix A, at page 8a. Petitioner specifically raised the Fourth Amendment question of the reasonableness of the search and seizure by the agents and also the question of the ambiguity and indefiniteness of Section 4301.68, Revised Code.

The Ohio Supreme Court held that Section 4301.68, Revised Code, is "plain, unambiguous and explicit and cannot be misunderstood." Appendix A, at page 6a. The Supreme Court further held that it was "unnecessary to consider and discuss the question of whether the exclusionary rule announced by the Supreme Court of the United States in the criminal case of *Mapp v. Ohio*, supra, and kindred cases is applicable to hearings before a public administrative agency like the Liquor Control Commission in instances where only the suspension or revocation of a liquor permit

is involved." Appendix A, at pages 7a-8a. Chief Justice Taft dissented from the language in paragraph four of the syllabus of the *Solomon* case, supra, which stated that the agents were authorized to remove the bottles of intoxicants from the permit premises of the petitioner "for examination and testing in a state laboratory to determine whether they comply with lawful requirements" of the Liquor Control Act. Appendix A, at page 2a. A timely motion for rehearing was denied by the Supreme Court of Ohio on December 22, 1965.

REASONS FOR GRANTING THE WRIT

1. The basis for the decision of the Ohio Supreme Court in the instant case was (1) that "by applying for and accepting a permit to sell intoxicating beverages [petitioner] made herself amenable to the provisions of the [Liquor Control Act] and thereby consented to the inspection of the premises and the appropriation for analysis of any intoxicating liquor *suspected* to be in violation of the liquor control laws" and (2) that it was, therefore, "unnecessary to consider and discuss the question of whether the exclusionary rule" of *Mapp v. Ohio*, 367 U.S. 643 (1961) was applicable to hearings "before a public administrative agency like the Liquor Control Commission in instances where only the suspension or revocation of a liquor permit is involved." 4 Ohio St. 2d 31, 36 (1965) (Emphasis added). By saying that petitioner "consented" to the search of her premises, the Ohio Supreme Court purported to render unimportant and irrelevant every one of the protections of the Fourth Amendment, and in particular the pervasive protection of "probable cause". The instant record discloses absolutely no basis for a finding of probable cause. (Appendix E, at pages 32a-33a).[1] Moreover it discloses no basis for a finding of reasonable suspicion, a significantly weaker protection. Indeed, the instant record would not even support a finding of suspicion unattended by reason. In short, the court below has torn down every reasonable barrier against oppressive and arbitrary governmental action, and it has sanctioned a return to the odious explor-

1. The Court of Appeals of Franklin County, in the course of its opinion, stated: "It should be noted that the record is totally silent as to any reason for the inspection of the permit premises and the taking of the liquor. Unlike the inspector in the *Hurless* case, supra, [73 Ohio L. Abs. 161, 136 N.E. 2d 736 (1955)] who testified that he had probable cause to believe an offense was being committed, the agents in the instant case offer no reason or excuse for the exercise of authority." Appendix B, at page 16a.

atory or general or ransack search for evidence of crime.[2]

The significant and important issues raised by the administrative search herein are: (1) whether Fourth Amendment principles apply to state administrative searches, at least to the extent of requiring that governmental invasion of privacy be justified by a showing of "probable cause" before the making of an administrative search; and (2) if Fourth Amendment principles do apply to the facts of the instant case, whether the proper enforcement mechanism is the exclusionary rule enunciated in *Mapp*, 367 U.S. 643 (1961).

This Court has not yet settled the question of whether *Mapp*, supra, applies to administrative proceedings. *Cleary v. Bolger*, 371 U.S. 392, 403, 413-14 (1963) (concurring opinions of Justices Goldberg and Douglas). That issue is now specifically raised by the instant record.

The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy. *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932). This Court has continually condemned general, exploratory searches of business premises, such as petitioner's premises, as being in violation of the Fourth Amendment. *United States v. Rabinowitz*, 339 U.S. 56, 62 (1950); *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931).

Out of the extensive litigation concerning the Fourth Amendment there have developed five basic classes of case: (1) arrest with a warrant; (2) search with a warrant; (3)

2. Violation of Section 4301.68, Revised Code, is made a misdemeanor by Section 4301.99(E), Revised Code. At the time of the search and seizure in the instant case, there was nothing which would have prevented the State from filing criminal charges against petitioner based upon the fruits of the agents' search herein rather than, or in addition to, pursuing the administrative proceeding before the Liquor Control Commission.

arrest without a warrant; (4) search without a warrant incident to an arrest with or without a warrant; and (5) search without a warrant not incident to an arrest. *Fourth Amendment Principles and Supreme Court Practice*, 25 Ohio St. L.J. 538, 544 (1964). Decisions of this Court concerning the first four classifications listed above are not applicable to the instant case as the petitioner was not arrested by the agents of the Department of Liquor Control nor did the agents possess a search warrant. Therefore, the instant case falls into the category of search and seizure without a warrant not incident to an arrest. However, regardless of the category, in none of these situations has it ever been remotely suggested that agents of any government could proceed without "probable cause".

To the contrary, the requirement of "probable cause" is the most basic protection against searches and seizures which otherwise would be condemned as general or exploratory searches for evidence. *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765). Even in the divided decision in *United States v. Rabinowitz*, 339 U.S. 56 (1950), the majority was careful to point out that "probable cause" was important. Mr. Justice Minton, speaking for the Court in *Rabinowitz*, supra, stated at pages 62-63:

> "Those cases [*Go-Bart Importing Co.* and *Lefkowitz*] *condemned general exploratory searches, which cannot be undertaken by officers with or without a warrant.* In the instant case the search was not general or exploratory for whatever might be turned up. Specificity was the mark of the search and seizure here. There was *probable cause* to believe that respondent was conducting his business illegally. The search was for stamps overprinted illegally, which were thought upon the most *reliable information* to be in the possession of and concealed by respondent in the very room where he was arrested, over which room he had immediate control and in which he had been selling such stamps unlawfully." (Emphasis added)

The requirement of "probable cause" was petitioner's only safeguard against arbitrary and exploratory governmental invasion of her privacy. In the instant case, at the time of the search of petitioner's premises and the seizure of her property, the record discloses that the agents of the Department of Liquor Control did not have "probable cause" to believe that an offense had been or was being committed by petitioner. Indeed, as stated above, the agents had no basis for even a reasonable suspicion or a suspicion unattended by reason that petitioner was engaging in an act in violation of the liquor laws. The instant search was a general exploratory search based, insofar as the record shows, upon no more than a mere hope, hunch or guess that something might be turned up.

The fact that an administrative search was involved in the instant case is irrelevant. Even in the cases of *Abel v. United States*, 362 U.S. 217 (1960) and *Frank v. Maryland*, 359 U.S. 360 (1959), where the government was given the greatest latitude in the making of administrative searches, there was, on the facts of each case, "probable cause" or a reasonable basis demonstrated for the governmental action taken.

In *Frank*, supra, "[C]ertainly the presence of a pile of filth in the back yard combined with the run-down condition of the house gave adequate grounds for such suspicion" of a "nuisance" so that the search "touch[ed] at most upon the periphery of the important interests safeguarded by the Fourteenth Amendment's protection against official intrusion." 359 U.S. at 366-67. The instant record is silent as to a showing of such "probable cause".

In *Abel*, supra, Justice Frankfurter stated that "[I]t is to be remembered that an I.N.S. officer may not arrest and search on his own. Application for a warrant must be made to an independent responsible officer, the District Director

of the I.N.S., to whom a *prima facie case* of deportability must be shown. The differences between the procedural protections governing criminal and deportation *arrests* are not of a quality or magnitude to warrant the deduction of a constitutional difference regarding the right of incidental search." 362 U.S. at 236-37 (Emphasis added). There was no arrest in the instant case; not even a "valid administrative arrest" giving rise to an incidental search as was found in *Abel*. More importantly, here the elements of "probable cause" or "reasonable suspicion" are missing.

Does it matter to any significant degree to the petitioner whether her place of business was searched by an administrative law officer, such as an agent of the Department of Liquor Control (who also is clothed with the power to arrest, Section 4301.10(7), Revised Code.), or by a police officer seeking evidence, e.g., of bootleg liquor? In each case her privacy has been invaded by an official authority which she is powerless to resist and for any abuse of which she is relegated to the civil courts. As was noted by Mr. Justice Brennan in his dissent in *Abel*, 362 U.S. 217, the individual's interest in privacy "would not appear to fluctuate with the 'intent' of the invading officer." 362 U.S. at 255. It is only the person who actually has the bootleg liquor secreted in his office or place of business who finds the invasion of his privacy by the policeman more offensive than that of the administrative official. He finds the policeman more offensive for the very reason that he has abused the privacy of his office or place of business by committing there the crime of illegal possession of bootleg liquor. Yet, under the exclusionary rule of *Mapp*, 367 U.S. 643, he may, if the policeman acted illegally, receive, in addition to his civil remedies, the very substantial bonus of freedom from conviction for that crime. As Judge Prettyman stated in

District of Columbia v. Little, 178 F. 2d 13, 17 (D.C. Cir. 1950), *aff'd on other grounds* 339 U.S. 1 (1950):

> "To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity."

There is nothing in the record to show that petitioner explicitly waived her constitutional protections afforded by the Fourth Amendment. Consent which is coerced is no consent. Mere submission to authority is not consent. *Johnson v. United States*, 333 U.S. 10 (1948); *Amos v. United States*, 255 U.S. 313 (1921). If petitioner had made any effort to resist the inspection and seizure of her property, she would have been in violation of Section 4301.66, Revised Code, a statute which makes it a crime to "hinder or obstruct any agent or employee of the department of liquor control . . . from making inspection or search of any place, other than a bona fide private residence, where intoxicating liquor is possessed, kept, sold, or given away." The agents' inspection and confiscation of petitioner's property was "demanded under color of office" and the petitioner's cooperation was given "in submission to authority rather than as an understanding and intentional waiver of a constitutional right." *Johnson v. United States*, 333 U.S. at 13. The Ohio Supreme Court based its theory that petitioner waived her Fourth Amendment protections on a doctrine of "implied" consent arising out of the petitioner's "applying for and accepting" a liquor permit. But, as stated at the outset, this is another way of saying that the pervasive protection of "probable cause", as well as the other protections afforded by the Fourth Amendment, is unimportant and irrelevant since the instant record is devoid of any finding of "probable cause" or even the weaker protection of a finding of "reasonable suspicion".

The violation of Section 4301.68, Revised Code, is made a criminal offense by Section 4301.99(E), Revised Code. If, as in the instant case, the State elects to proceed against the petitioner's liquor license in an administrative proceeding rather than by filing a criminal charge against petitioner, can the State "by this device take from the proceeding its criminal aspect and deprive [petitioner] of [her] immunities as [a] citizen(s)"? *Boyd v. United States*, 116 U.S. 616, 634 (1886). This Court in *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693, 14 L. Ed. 2d 170 (1965), relying on *Boyd*, supra, pointed out that "a forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law. . . . It would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible." 14 L. Ed. 2d at 175.

Here, the Department of Liquor Control in the administrative proceeding charged the petitioner with a violation of Section 4301.68, Revised Code. The sanction imposed by the Liquor Control Commission for the violation was revocation of petitioner's Class D-5 permit. There can be no question but that such a sanction is a penalty; "its object, like a criminal proceeding, is to penalize for the commission of an offense against the law." 14 L. Ed. 2d at 175. And, as this Court recognized in *Boyd*, 116 U.S. 616 (1886), and *One 1958 Plymouth*, 380 U.S. 693 (1965), the civil form should not be allowed to disguise its criminal nature and by such device deprive petitioner of her constitutional protection. See *Giaccio v. Pennsylvania*, . . . U.S. . . ., 15 L Ed. 2d 447, 450 (1966).

It is true that the State of Ohio is not required by the

Federal Constitution to grant petitioner a license to sell alcoholic beverages. But that is not to say that the State, having granted to petitioner a Class D-5 permit, may act in a "highhanded" manner and deny to petitioner the constitutional rights which are afforded to her by the Federal Constitution, rights which petitioner has not waived. See, *Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

In *Mapp*, 367 U.S. 643 (1961), this Court held that the Fourth Amendment is enforceable against the States through the Fourteenth, and "it is enforceable against them by the same sanction of exclusion as is used against the Federal Government", by the application of the same constitutional standard prohibiting "unreasonable searches and seizures." 367 U.S. at 655. Moreover, in *Ker v. California*, 374 U.S. 23, 33-34 (1963), this Court stated that it would apply federal standards of reasonableness to state proceedings. The purpose of the exclusionary rule "is calculated to prevent, not to repair. Its purpose is to deter —to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960).

The rights of privacy and personal security against arbitrary police intrusion—which the Fourth Amendment protects and guarantees—are fundamental rights, considered by this Court as implicit in the concept of ordered liberty. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949). Are these guarantees conditioned on the form of action the Government has in mind when it chooses to invade a man's privacy? To hold these rights so conditioned would be to establish a gross anomaly in the law. In *Elkins*, 364 U.S. 206, this Court emphasized the importance of looking to the *effect* of the Fourth Amendment violations when it observed that "to the victim it matters not whether his con-

stitutional right has been invaded by a federal agent or by a state officer." 364 U.S. at 215. Likewise, it matters not to petitioner whether her constitutional right has been invaded for indictment purposes or for purposes of revocation of her liquor permit.

If *Mapp*, 367 U.S. 643, is not extended to the instant case, it cannot remain at its present weight and significance in American constitutional law—it can only retreat. This is because law enforcement officers would then feel free to disregard completely the Fourth Amendment under the guise that they are searching with their civil hats on rather than their criminal hats. Thus, police actions which this Court in *Mapp* deemed "highhanded" and "roughshod" (367 U.S. at 644-45) could be repeated by an administrative agent's announcement at a permit holder's door, just as in the instant case, that he is not there to arrest the permit holder, but only to obtain evidence by which the permit holder's liquor license will be revoked. Such a shortcut to obtain evidence which the State could not otherwise obtain "tends to destroy the entire system of constitutional restraints on which the liberties of the people rest" (*Mapp*, 367 U.S. at 660 and encourages the "official lawlessness" and "disobedience to the Federal Constitution" which the exclusionary rule was meant to remedy. *Mapp*, 367 U.S. at 655, 657. The application of the exclusionary rule to the facts of the instant case—a governmental search without "probable cause" or "reasonable suspicion"—is necessary to nullify what is otherwise the flouting of the Fourth Amendment.

Mapp v. Ohio promised that it would "close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right [of privacy], reserved to all persons as a specific guarantee

against that very same unlawful conduct." 367 U.S. at 654-55. We urge that that last door be kept secure.

2. As heretofore stated, the violation of Section 4301.68, Revised Code, is made a misdemeanor by Section 4301.99-(E), Revised Code, as well as a ground for the suspension or revocation of a permit issued by the Department of Liquor Control. In a series of cases, this Court has held that a state has no power, under the Fourteenth Amendment, to enact a statute which is defined by terms so indefinite and vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). The test has since been cited with approval. *E.g., Baggett v. Bullitt*, 377 U.S. 360, 367 (1964); *Winters v. New York*, 333 U.S. 507, 515, 518 (1948); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 242 (1932); and see *Giaccio v. Pennsylvania*, ... U.S. ..., 15 L. Ed. 2d 447 (1966).

A comparison of the language of Section 4301.68, Revised Code, with that of 26 U.S.C. §5301(c) (Supp. 1965), reveals that Section 4301.68, Revised Code, is unconstitutionally vague and indefinite:

Title 26, U.S.C. § 5301(c) (Supp. 1965), provides in pertinent part:

> "Section 5301(c) Refilling of liquor bottles.—No person who sells, or offers for sale, distilled spirits, or agent or employee of such person, shall—
>
> (1) place in any liquor bottle *any distilled spirits whatsoever* other than those contained in such bottle at the time of stamping under the provisions of this chapter [§§ 5001-5692 of this title]; or
>
> (2) possess any liquor bottle in which *any distilled spirits* have been placed in violation of the provisions of paragraph (1); or
>
> (3) by the addition of *any substance whatsoever* to

any liquor bottle, in any manner alter or increase any portion of the original contents contained in such bottle at the time of stamping under the provisions of this chapter [§§ 5001-5692 of this title]; or

(4) possess any liquor bottle, any portion of the contents of which has been altered or increased in violation of the provisions of paragraph (3); * * *"

(Emphasis added.)

Section 4301.68, Revised Code, provides:

"No person shall sell, offer for sale, or possess intoxicating liquor in any original container which has been diluted, refilled, or partly refilled."

26 U.S.C. § 5301(c) clearly and unambiguously proscribes the refilling of any liquor bottle after stamping with "any distilled spirits whatsoever" or "any substance whatsoever". *Stilinovic v. U.S.*, 336 F. 2d 862, 863 (8th Cir. 1964). Section 4301.68, Revised Code, makes it an offense for *any person* to "sell, offer for sale, or possess intoxicating liquor in any original container which has been diluted, refilled, or partly refilled."

What is prohibited by Section 4301.68, Revised Code? Is it the sale or possession of a diluted container, or is it the sale or possession of intoxicating liquor which has been diluted and if so, with what? Does the statute prohibit the sale or possession of an original container refilled or partially refilled with milk, water, soft drink, or any other fluid? Is the statute violated if an original container of intoxicating liquor is refilled with exactly the same brand of intoxicating liquor?

It also must be borne in mind that Section 4301.68, Revised Code, is not limited to permit holders but applies to every person in the State of Ohio. Thus, it would be a crime for a consumer of intoxicating liquor to merely possess on his person, or in his home or place of business, a

container which originally was filled with an alcoholic beverage but has been refilled or partially refilled by the consumer with any kind of liquid, whether non-intoxicating or otherwise.

By asking such questions as set out above, it becomes clear that the terms of Section 4301.68, Revised Code, are unconstitutionally indefinite and vague, and that, therefore, the Supreme Court of Ohio committed error when it held that Section 4301.68, Revised Code, "is plain, unambiguous and explicit and cannot be misunderstood." 4 Ohio St. 2d at 35.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

ISADORE TOPPER,
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Attorneys for Petitioner.

APPENDIX A

4 Ohio St. 2d] SOLOMON *v.* L. C. COMM

Syllabus.

SOLOMON, D. B. A. BROOKSY'S BAR, APPELLEE, *v.* LIQUOR CONTROL COMMISSION, APPELLANT.

[Cite as Solomon v. Liquor Control Comm., 4 Ohio St. 2d 31.]

Liquor Control Act—Permit required to dispense alcoholic beverages—Holder of permit subject to provisions of act—Powers and duties of Department of Liquor Control—Delegation of powers—Sale of diluted liquor prohibited—Permit holder subject to inspection by department—Removal of bottles of intoxicants from premises for inspection—Possession of diluted liquor or refilled containers—Scienter or guilty knowledge not required—Evidence—Contents of bottles analyzed admissible.

1. One engaging in the dispensing and sale of alcoholic beverages is required by statute to secure a permit from the state to carry on such business and is subject to the provisions of the Liquor Control Act in the conduct thereof.
2. Section 4301.10, Revised Code, sets forth the powers and duties of the Department of Liquor Control and provides, *inter alia,* that it shall control the traffic in beer and intoxicating liquor, including the sale thereof, enforce the laws pertaining thereto, inspect upon demand the place of business of any permit holder, delegate to its agents any powers of investigation which the department itself possesses and exercise all other powers

expressly or by necessary implication conferred on it by the laws governing the dispensing and sale of alcoholic beverages.

3. Section 4301.68, Revised Code, a measure designed to protect the purchasers and consumers of alcoholic beverages, expressly prohibits any person from selling, offering for sale or possessing intoxicating liquor in any original container which has been diluted, or which container has been refilled or partly refilled.
4. One who applies for and is issued a permit to sell intoxicating beverages thereby subjects himself to the provisions of the Liquor Control Act and assents to the reasonably exercised inspection and examination by the agents of the Department of Liquor Control of his permit premises, including bottled intoxicants which he possesses and offers for sale thereon, and a removal of bottles of intoxicants from the permit premises by such agents for examination and testing in a state laboratory to determine whether they comply with lawful requirements is authorized by the provisions of the Liquor Control Act.
5. Section 4301.68, Revised Code, in its wording does not require *scienter* or guilty knowledge on the part of one who is affected thereby.
6. Where a permit holder is charged with a violation of Section 4301.68, Revised Code, the contents of the bottles of intoxicants lawfully taken from his premises by agent of the Department of Liquor Control, which, when analyzed and laboratory tested by a state chemist, are found to be deficient and violative of the provisions of such statute, are admissible in evidence at the hearing provided by statute before the Liquor Control Commission, wherein the matter for determination is the suspension or revocation of the permit.

(No. 39213—Decided December 1, 1965.)

APPEAL *from the Court of Appeals for Franklin County.*

Statement of the Case.

This matter had its origin before the Ohio Liquor Control Commission when appellee herein, Betty Solomon, operating "Brooksy's Bar" in the city of Cleveland under a permit, was charged with a violation of Section 4301.68, Revised Code, in the following language:

"On August 14, 1961, you did possess in and upon the permit premises, intoxicating liquor in an original container which had been diluted, refilled, or partially refilled—in violation of the provisions of the Liquor Control Act."

The applicable statute itself, a part of the Liquor Control Act, reads:

"No person shall sell, offer for sale, or possess intoxicating liquor in any original container which has been diluted, refilled, or partly refilled."

Appellee denied the charge.

At the hearing before the commission, it was stipulated and agreed by opposing counsel that, if two designated agents of the Department of Liquor Control were called to testify, they would state that on Monday, August 14, 1961, they entered appellee's permit premises and informed her that they intended to remove several bottles of spirituous liquor (whiskey) from the back bar for analysis by the state chemist to determine whether they had possibly been refilled.

Several bottles of liquor were taken by the agents (apparently without objection or protest) and sealed on the premises, and a receipt therefor, signed by the two agents and by the appellee, was given to appellee. These bottles of whiskey were delivered by the agents on the same day to the Cleveland district office of the Department of Liquor

Control, where, later, a state chemist picked them up, still sealed, and took them to Columbus for analysis.

In the following December, the same two agents returned to appellee's place of business and delivered to her a citation, charging her with a refilling of the appropriated bottles of whiskey.

Before the hearing, counsel for appellee filed a written motion with the commission to the effect that no evidence be introduced at the hearing, and that the whiskey bottles and their contents be excluded for the reason that they were illegally obtained under the holding of the Supreme Court of the United States in the case of *Mapp v. Ohio*, 367 U. S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684.

This motion was overruled, as was a similar motion made at the hearing prior to the taking of evidence.

Called as a witness by appellant was a state chemist, whose qualifications were admitted. He stated that upon chemical analysis all the appropriated whiskey, except one bottle, showed an appreciably lower proof—alcoholic strength—than that appearing on the bottle labels. He testified further that in his opinion, based on experience, the reduced proof was attributable to refilling the bottles with lower-proof whiskey or by diluting the contents with water. Such testimony was not objected to, and appellee introduced no evidence.

The commission sustained the charges and issued an order revoking appellee's permit.

An appeal to the Court of Common Pleas of Franklin County resulted in an affirmance of the commission's order, but, on further appeal to the Court of Appeals, that court by a two-to-one vote reversed the judgment of the lower court, vacated the order of the commission and returned the cause to the commission for further proceedings "according to law and the decision of this court."

In its judgment entry, the Court of Appeals said in part:

"The court * * * finds that, because of a complete lack of statutory authority for the seizure and confiscation of the bottles of intoxicating liquor * * * the admission of those exhibits in evidence at the hearing before the Liquor Control Commission was error and, consequently, the order of said commission is not in accordance with law."

Allowance of the appellant's motion to require the Court of Appeals to certify the record to this court places the cause here for review and decision.

Mr. Leonard J. Stern, Mr. Isadore Topper and *Mr. Fred W. Garmone*, for appellee.

Mr. William B. Saxbe, attorney general, and *Mr. James E. Rattan*, for appellant.

Opinion

ZIMMERMAN, J. In approaching a decision in this case, it is of importance to consider the nature of the liquor business, particularly as it here relates to the dispensing and sale of intoxicating liquor at retail by the glass. Because of the harmful potentialities incident to the conduct of such business, those engaging therein must obtain a permit from the state and are thereafter subject to strict regulation by statute and by rules and regulations adopted and promulgated pursuant to statutory authority by the Department of Liquor Control, the regulating and supervising agency created by the state to oversee and police, as it were, the liquor business. One who applies for and is issued a permit to sell alcoholic beverages thereby assents to the reasonable and lawful conditions imposed by statute and rule.

Section 4301.10, Revised Code, sets forth the powers and duties of the Department of Liquor Control. As pertinent here, that section provides:

"(A) The Department of Liquor Control shall:

"(1) *Control* the traffic in beer and intoxicating liquor in this state, *including the* manufacture, importation, and *sale* thereof;

"* * *

"(4) *Enforce* Chapters 4301. and 4303. of the Revised Code * * *;

"* * *

"(6) *Inspect, upon demand, the* books, accounts, records, memorandums, and *place of business* of any person subject to Chapters 4301. and 4303. of the Revised Code * * *;

"(7) Delegate to any of its agents or employees any power of investigation which the department possesses * * *;

"(8) *Exercise all other powers expressly or by necessary implication* conferred upon the department by Chapters 4301. and 4303. of the Revised Code * * *." (Emphasis supplied.)

In the opinion of a majority of this court, the terms of the statute quoted above are sufficiently broad and comprehensive to allow agents of the department to enter the business premises of a permit holder to determine whether in the operation of his business he is complying with the laws and regulations governing that business. A permit holder is not without remedy in the courts for unauthorized abuses perpetrated by agents of the department.

As we have already noted, Section 4301.68, Revised Code, a statute designed to protect the customer and found in the Liquor Control Act, expressly prohibits any person from selling, offering for sale or *possessing* "intoxicating liquor in any original container which has been diluted, refilled, or partly refilled." Such provision is plain, unambiguous and explicit and cannot be misunderstood. The statute is not of the kind where *scienter* or guilty knowledge must be alleged and proved. See *Andrews v. Board of Liquor Con-*

trol, 164 Ohio St. 275, 278, 131 N. E. 2d 390, 392. Compare *State v. Huffman*, 131 Ohio St. 27, 1 N. E. 2d 313, first paragraph of the syllabus; *State v. Healy*, 156 Ohio St. 229, 102 N. E. 2d 233; *State v. Lisbon Sales Book Co.*, 176 Ohio St. 482, 200 N. E. 2d 590; and 21 American Jurisprudence 2d 169, Section 89 *et seq.*

Where a permit holder is suspected of a violation of Section 4301.68, Revised Code, laboratory analysis of the contents of labeled bottles of spirituous liquors is the most accurate means to determine whether such contents have been diluted or tampered with in violation of the Liquor Control Act, and the power given the Department of Liquor Control to "inspect" a permit holder's premises carries with it the power to effectively examine his bottled intoxicants within reasonable limits to discover their quality and strength. Ordinarily, the honest permit holder will not be disturbed and has nothing to fear; others must abide the possible consequences of their unlawful conduct.

Our conclusion is that the appropriation of appellee's bottles of whiskey and the analysis of their contents were authorized under the Liquor Control Act, and that by applying for and accepting a permit to sell intoxicating beverages appellee made herself amenable to the provisions of that law and thereby consented to the inspection of the premises and the appropriation for analysis of any intoxicating liquor suspected to be in violation of the liquor control laws. We think it can fairly be said that appellee's appropriated bottled whiskey intended for sale to bar patrons, which upon analysis showed a proof below that listed on the bottle labels, came within the classification of contraband property under the prohibitory terms of Section 4301.68, Revised Code. It follows that such bottles of whiskey were properly admitted in evidence at the hearing before the Liquor Control Commission.

Because of the position taken, it becomes unnecessary to

consider and discuss the question of whether the exclusionary rule announced by the Supreme Court of the United States in the criminal case of *Mapp v. Ohio, supra,* and kindred cases is applicable to hearings before a public administrative agency like the Liquor Control Commission in instances where only the suspension or revocation of a liquor permit is involved. See 1 Ohio Jurisprudence 2d 490, 491, Sections 90 and 91; 2 American Jurisprudence 2d 187, Section 380; 42 American Jurisprudence 445, 446, Section 114; 73 Corpus Juris Secundum 445, Public Administrative Bodies and Procedure, Section 125 *et seq.*

This court has held that a permit to sell intoxicating beverages is not property but a mere license which may be suspended or revoked for good cause shown. *State, ex rel. Zugravu, v. O'Brien,* 130 Ohio St. 23, 196 N. E. 664; and *Abraham v. Fioramonte,* 158 Ohio St. 213, 107 N. E. 2d 321, 33 A. L. R. 2d 1267.

The evidence introduced before the commission was relevant and pertinent to the charge against the appellee and was sufficient to support the commission's determination that appellee had committed an offense interdicted by statute and to support the affirmance of the commission's order by the Court of Common Pleas.

Accordingly, the judgment of the Court of Appeals is reversed and that of the Court of Common Pleas is affirmed.

Judgment reversed.

MATTHIAS, O'NEIL, HERBERT, SCHNEIDER and BROWN, JJ., concur.

TAFT, C. J., concurs in the syllabus except for the portion of paragraph four after the second comma therein.

THE SUPREME COURT OF THE STATE OF OHIO

1965 Term

To wit: Wednesday, December 1, 1965

THE STATE OF OHIO,
City of Columbus

BETTY SOLOMON ETC.,

Appellee,

vs.

LIQUOR CONTROL COMMISSION ETC.,

Appellant.

No. 39213

APPEAL FROM THE COURT OF APPEALS

for FRANKLIN County

This cause, here on appeal from the Court of Appeals for Franklin County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed for the reasons stated in the opinion filed herein; and, this Court proceeding to render the judgment that the Court of Appeals should have rendered, it is ordered that the judgment of the Court of Common Pleas is affirmed.

It is ordered and adjudged also that..... apellant..... recover from .....appellee.... costs expended in this Court in the Court of Appeals and Court of Common Pleas; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this etnry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this.....day of ..... 19....

..... Clerk

..... Deputy

THE SUPREME COURT OF THE STATE OF OHIO

1965 Term

To wit: Wednesday, December 22, 1965

No. 39213

The State of Ohio,
City of Columbus

BETTY SOLOMON ETC.,

Appellee,

vs.

LIQUOR CONTROL COMMISSION, ETC.,

Appellant.

REHEARING

It is ordered by the court that rehearing in this case is denied.

It is further ordered by the Court that issuance of the mandate in this case be, and the same hereby is, stayed for a period of twenty (20) days from this date to enable counsel for appellee to apply to the Supreme Court of the United States for an indefinite stay of execution.

/s/ KINGSLEY TAFT,
Chief Justice.

I, Thomas L. Startzman, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. 47, page 372.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 23rd day of December 1965.

/s/ THOMAS L. STARTZMAN, *Clerk.*

By /s/ NORMAN MYERS, *Deputy.*

APPENDIX B

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 7600

BETTY SOLOMON dba BROOKSY'S BAR,
2031 East 105th Street, Cleveland, Ohio,
Appellant-Appellant,

vs.

LIQUOR CONTROL COMMISSION,
STATE OF OHIO,
Appellee-Appellee.

OPINION

Rendered on September 22, 1964

Mr. Leonard J. Stern,
306 Huntington Bank Building,
Columbus, Ohio,
For Appellant-Appellant.

Mr. William B. Saxbe, Attorney General,
Mr. David L. Kessler and
Mr. Larry G. Brake, Assistants,
Statehouse Annex, Columbus, Ohio,
For Appellee-Appellee.

Troop, J.

On Monday, August 14, 1961, agents of the Ohio Department of Liquor Control entered the premises of permit holder, Betty Solomon, dba Brooksy's Bar, and advised her that they were going to confiscate some partial four-fifths bottles of spirituous liquor from the back bar of her establishment for the use of the state chemist, who would analyze

them for possible refilling. This was done and an analysis was made by State Chemist Howard Prisk, following which the permittee was advised of the charge made against her. There seems to have been no specific objection made by the permittee to the removal, sealing, handling, nor by counsel as to the method of identifying the liquor and the seven containers removed by the state agents from the permit premises.

Counsel for the permit holder made timely motions to exclude the evidence, taken by the state agents, from the consideration of the commission at the time of the hearing of the violation as charged against the permit holder, Betty Solomon. The charge preferred against the permit holder is as follows:

> "On August 14, 1961, you did possess in and upon the permit premises, intoxicating liquor in an original container which had been diluted, refilled, or partially refilled—in violation of the provisions of the Liquor Control Act."

Hearing was held as scheduled. In addition to certain stipulations placing some facts before the commission, State Chemist Howard Prisk testified. His testimony consisted of a comparison of "proof" as shown on the label of the bottles delivered to him with the "proof" as revealed by his own analysis of the contents of the bottles. Only one of the seven bottles contained liquor, which in the opinion of the chemist, was satisfactory as shown by his analysis. The other six were deficient in "proof" and indicated a practice of refilling in his opinion.

At the close of the hearing, counsel for the permit holder again moved that the evidence and testimony of the chemist be excluded. His motion was overruled and the evidence admitted. At the time of the hearing counsel predicated his motion for the exclusion of the evidence on the ground that it had been illegally obtained.

In a decision issued June 20, 1963, the commission found the permit holder guilty of the charge brought against her and as a penalty revoked her Class D-5 permit. An appeal was taken from the decision of the commission to the Court of Common Pleas of Franklin County, and submitted upon briefs, oral arguments of counsel and the transcript of testimony. The Common Pleas Court held that the rulings of the commission on the motions of the permit holder were correct and that the order revoking the permit was "sustained by reliable, probative and substantial evidence." It is from the judgment of the Franklin County Court of Common Pleas that this appeal is taken.

Counsel for the appellant, Betty Solomon, sets out six assignments of error upon which he relies. Some of them are interrelated. The brief of counsel is expansive and involves a discussion of many facets of the statutes and case law possibly applicable in the instant case. The one issue to which this review gives attention concerns the right of the agents of the Department of Liquor Control to seize and remove from the premises of the permit holder a certain seven bottles of whiskey and confiscate them for the purpose of developing the prosecution of a charge against the permittee. The permit holder, by motions duly made, requested the return of the property taken and the suppression of the evidence derived from the taking, which motions were overruled by the commission.

At the outset, let it be made clear that the case of *Mapp v. Ohio* (1961, 367 U. S., 643) is of no help to the appellant permit holder in the instant case. That case dealt with a criminal matter and concerned a police officer who forcibly entered a private residence without a warrant and obtained evidence upon which conviction was based.

Constitutional protections against unreasonable searches and seizures accrue to the private citizen. It is emphasized

again, and by this time it should be abundantly clear, that the permit holder, by becoming such, subjects himself to the operation of the liquor control statutes as enacted by the Legislature for the regulation of the liquor business. Permission to operate within prescribed limits is conferred on the permittee by the State of Ohio and in securing his permit he elects to accept the statutory limitations imposed and waives some of his constitutional rights that might otherwise be asserted as a private citizen. The right of a state to regulate the liquor business is established by amendment to the Federal Constitution and by supporting decisions of the Federal Courts. We look then to the regulating statutes to determine the rights of the permit holder and likewise to determine the area and limits within which enforcement officials representing the machinery for control established by the state, may operate. Statutes prescribe what they may or may not do.

This court considered a question similar to the one before us on this appeal and followed the applicable basic rule in the case of *Hurless, d.b.a. Ray's Playhouse v. Department of Liquor Control* (1955), 73 Ohio Law Abs., 161. Headnote 3 of the case states accurately the opinion of the court, as follows:

> "A permittee under the Ohio Liquor Control Act is not in the status of a private citizen, he secures his permit and conducts his business subject to the provisions of the Liquor Control Act and by securing his permit and electing to operate under the Liquor Control Act he waives the Constitutional protection, if any, as to the right to search his premises and seize property, if found to be in violation of the law."

The unconstitutionality of Section 6064-63, General Code, authorizing officers of the law to make an inspection or search of the premises without a search warrant had been urged in the *Hurless* case, supra. In meeting this argument

the court announced the basic rule as quoted. The court, at page 162, makes a further noteworthy observation, as follows:

> "* * * Independent of § 6064-63 GC, upon the testimony of the Inspector of the Board, he had probable cause to believe that an offense was being committed in the permit premises when he sought entrance thereto and this would have justified a search."

In the instant case, the charge against the permit holder is based upon Section 4301.68, Revised Code, as follows:

> "No person shall sell, offer for sale, or possess intoxicating liquor in any original container which has been diluted, refilled, or partly refilled."

Permittee was charged with the possession of the offending containers. In passing, it may be said that there is nothing ambiguous about the quoted section. It is perfectly clear that the permit holder is not allowed to have bottles containing diluted or refilled liquor on his premises. There are no extenuating circumstances recited or implied in the language of the section. You just simply may not have them.

The Attorney General, for the commission, urges that the department was authorized to make the seizure under Section 4301.10, Revised Code. Powers and duties of the department are set out in the section. In subsection (7) particular power is conferred, as follows:

> "Inspect, upon demand, the books, accounts, records, memorandums, and place of business of any person subject to Chapters 4301. and 4303. of the Revised Code or the laws relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquor, and the sale of alcohol.;"

If the agents of the department had the power to seize and confiscate the seven bottles, and contents, introduced into evidence at the hearing before the commission as Ex-

hibits A through G, that power must come from the foregoing section. No other statute appears to sustain it.

Counsel for the appellant permit holder made two motions before the commission at the time of hearing and later, one to preclude consideration of the seized liquor as evidence and the other to secure the return of the property seized. Both motions were overruled by the commission.

While somewhat interrelated the seizure and the confiscation of the liquor used as evidence are in fact two separate concepts. The Legislature must confer authority upon the Department of Liquor Control to do either or both. To repeat, we are not concerned with a possible violation of Betty Solomon's constitutional rights, but we consider only whether or not the agent of the department operated within the authority conferred by statute.

The record of the hearing before the Liquor Control Commission, on June 20, 1963, as certified to the Court of Common Pleas for review, must be the center of interest in this appeal. It should be noted that the record is totally silent as to any reason for the inspection of the permit premises and the taking of the liquor. Unlike the inspector in the *Hurless* case, supra, who testified that he had probable cause to believe an offense was being committed, the agents in the instant case offer no reason or excuse for the exercise of authority. Be that as it may, we simply observe that such an approach suggests the danger inherent in any control system. Regulation without limitation makes it possible for enforcement to become purely arbitrary even to the point of discrimination motivated by personal differences or even ulterior motives, neither of which has any place in a regulatory procedure even where rigid regulation for the protection of the public interest is required.

In the instant case the approach of the agents to the situation before them is clear from the record. Particular attention is directed to the stipulations made (R. 3). The agents identified themselves and "informed Betty Solomon that they were going to confiscate some partial four-fifths bottles of spirituous liquor from the back bar" for analysis by the state chemist. Further, the record says that Inspector Duffy "confiscated the following bottles" and, referring to the itemized list of the bottles, the investigator "delivered the confiscated evidence to the Cleveland District Office * * *." (R. 4)

Section 4301.10 (7), Revised Code, gives the department's agents the power to "inspect, upon demand" the "place of business" of a permit holder. Assuming that the stock of merchandise carried by the permit holder is a part of the "place of business," and, therefore, subject to inspection upon proper demand, by what process of interpretation, even the most liberal rather than the required strict, can the language of the section be so disfigured as to be made to read *confiscate,* "upon demand," the property of the permit holder, even if the expressed intention is chemical analysis. Such a view could produce a situation where the entire stock of a small operator could be removed at the whim of a director or agent, even at a time when the removal would leave the permit holder with no merchandise to meet his most favorable volume of business. Attention is directed to the opinion issued by this court on August 11, 1964, in the case of *In the Matter of Broadway Enterprises, Inc., dba Broadway Grill, v. Board of Liquor Control,* Case No. 7586, in which an inspection took place on the premises and a taking followed the discovery of an offense.

Can it be said, in fairness and justice, that the permit holder waived any rights she may have had? It is altogether unlikely that there is a permit holder in the State of Ohio unaware of the provisions of Section 4301.66, Re-

vised Code. Acquiescence on the part of the permit holder to the "demand" of an inspector can hardly be regarded as a waiver of any right he might have when he well knows that to "hinder or obstruct any agent" purporting to make an "inspection" of a permit premises raises the ugly head of the possibility of another charge against him. Such a statute makes it virtually impossible for a permit holder to actively resist what he may believe to be, and in fact is, an illegal enforcement act.

Nothing in Section 4301.10 (7), Revised Code, authorizes carrying away anything belonging to the permit holder as a part of the inspection of a place of business. Such a seizure, as in the instant case, has no foundation in the statutes enacted by the Legislature.

In contrast to the language used by the Legislature in Section 4301.10 (7), Revised Code, we find detailed and carefully restricted powers of the department in the taking of beer and intoxicating liquors under other particular circumstances. For example, Section 4301.29, Revised Code, details the method of handling stocks of beer and liquor upon the revocation or cancellation of a permit. The section covers also the duty of the department when the stocks of a permittee are seized by a lien holder. Section 4301.45, Revised Code, outlines in detail the course to be followed when vehicles are seized in the act of illegally transporting liquor. Included are provisions for the disposition of the property, protection of a lien holder, as well as provision for the posting of a bond to insure the return of the property for trial purposes. So too, in Section 4301.52, Revised Code, we find there specified the methods available to the Tax Commissioner in case of seizures for the enforcement of the laws placing taxes on the various intoxicating liquors and beer.

The Legislature is cognizant of seizure situations and provided for them in several statutes. It cannot well be argued, therefore, that the Legislature was unmindful of

the one presented by this appeal. Not only have legislative draftsmen provided for the particular situations noted, but in the drafting of the more recent amended statutes indicate awareness of the limitations imposed upon such enactments by the decision of our Supreme Court in *Grieb v. Department of Liquor Control of the State of Ohio et al.* (1950), 153 Ohio St., 77.

In the instant case, or in any seizure situation, confiscation of any substantial amount of merchandise could result in financial impairment preventing replacement of the stock resulting in effectual revocation of a permit without conforming to statutory revocation requirements. Department's Exhibit A, I. W. Harper Whiskey, 100 proof by the label, tested as being 99.66 proof, which State Chemist Prisk says was satisfactory (R. 6), or not illegal. It still remains in the hands of the department—confiscated.

To seize without cause is arbitrary. Even if there could be established a statutory basis for the *seizure*, as within the language used in the statutes, or implied by severe strain on that language, nowhere in the applicable statutes is there one syllable to support the *confiscation* with which we are confronted in the instant case.

Counsel for the permit holder and the Attorney General for the commission have presented lengthy and well-developed briefs. Not all assignments of error nor arguments are discussed in this opinion. Only the crucial point and its incidental facets have been emphasized. No mention is made in the briefs, or in the record of proceedings anywhere, of the attachment to the record of the hearing of photocopies of previous orders of the commission relative to the permit premises. They reflect seven charges against the permit premises, although others than Betty Solomon are named as permit holders, over a period from 1953 to 1958. Three of the seven charges were dismissed and four were found to be valid and penalties were imposed.

Such a supplemental record has no place in an appeal before this court and certainly could not be considered by the Common Pleas Court. The only record a reviewing court may notice concerns the hearing of the particular charge involved in the case appealed. It is doubtful that the commission should have such a record before it until after determination as to the particular charge lodged against the permit holder, then on for hearing, and then only for the purpose of deciding the penalty to be imposed. The board's quasi-judicial character makes the standards of propriety and fairness most important. To attach such documents to the record on appeal opens the door to a prejudicial influence unjustified in even the most unconventional hearing atmosphere.

The trial court sustained the commission in the matter of its rulings on the motions made concerning admission of and confiscation of the evidence taken from the back bar in the permit holder's premises and sustained the decision and order of the commission, holding that the revocation order was predicated upon reliable, probative and substantial evidence in the entire record. Either by inadvertence or design the Court of Common Pleas did not find that the order was also "according to law" as required by Section 119.12, Revised Code.

There being no statutory authority for the seizure and confiscation of a permit holder's property, i. e., stock of merchandise, for the purpose of chemical analysis, the exhibits admitted into evidence were not obtained according to law. The attaching of copies of former penalty orders to the record on an appeal is beyond the concept of "according to law."

Because of a complete lack of statutory authority for the seizure and confiscation in the instant case, we hold that the seized property may not be admitted into evidence in a hearing before the commission and the admission, there-

fore, of the department's Exhibits A through G was in error and not according to law.

The judgment of the trial court is reversed, the order of the Liquor Control Commission of Ohio is vacated and the case remanded to the commission for further proceeding according to law and this decision.

DUFFY, P.J., concurs.

DUFFEY, J., dissents.

DUFFEY, J., dissenting.

I agree with the majority that the Liquor Control Act does not authorize a seizure of property in connection with the mere inspection of a place of business. See Section 4301.10 (7), Revised Code. However, the question is whether the admission of the illegally seized evidence and the testimony was prejudicial error.

The proceedings before the commission are civil and administrative, concerned only with the suspension or revocation of a license to do business. It is not a criminal proceedings, and therefore, not subject to criminal law doctrines. The exclusionary rule applicable to evidence illegally obtained does not apply in such a proceeding. The acts of the agents here may subject them to criminal and civil liability, but they do not operate to warrant the exclusion of evidence which is relevant, competent and material to the issues presented.

I agree also that it was an unfortunate impropriety to attach information on the appellant's previous history to the record. I sincerely hope that the Liquor Board does not review and consider such information prior to making determinations on the merits.

JOURNAL ENTRY

This cause came on to be heard upon appeal from the decision and order of the Court of Common Pleas of Frank-

lin County affirming an order of the Liquor Control Commission which revoked appellant's Class D-5 liquor permit; and, upon consideration of the record of proceedings before said Commission together with the briefs and arguments of counsel, the Court, being fully advised in the premises, finds that, because of a complete lack of statutory authority for the seizure and confiscation of the bottles of intoxicating liquor which constitute Department's Exhibits A through G, the admission of those exhibits in evidence at the hearing before the Liquor Control Commission was error and consequently the order of said Commission is not in accordance with law.

It is, therefore, ORDERED that the judgment of the Court of Common Pleas of Franklin County in this cause be, and the same hereby is, reversed, that the order of the Liquor Control Commission be, and the same hereby is, vacated, and that the cause be remanded to said Commission for further proceedings according to law and the decision of this Court.

Costs taxed to appellee.

Exceptions to appellee.

/s/ JOHN C. DUFFY,
Judge

/s/ HORACE W. TROOP,
Judge

APPROVED:
/s/ ISADORE TOPPER,
/s/ LEONARD J. STERN,
/s/ FRED W. GARMONE,
Attorneys For Appellant.
/s/ WM. B. SAXBE,
Attorney General,
/s/ JAMES E. RATTAN,
Assistant Attorney General,
Attorneys For Appellee.

APPENDIX C

COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

No. 217556

BETTY SOLOMON, ETC.,

Appellant,

vs.

LIQUOR CONTROL COMMISSION,

Appellee.

DECISION

Rendered this 6th day of November, 1963

SATER, J.

This is an appeal from an order of revocation based on violation of Revised Code, section 4301.68, which provides:

> "No person shall sell, offer for sale, *or possess* intoxicating liquor in any original container which has been diluted, refilled or partly refilled."

It was stipulated, i.e., admitted, that in August, 1961, appellee's inspectors went to the permit premises, identified themselves to appellant, stated that they were going to confiscate some partly filled whiskey bottles for the State chemist to analyze for possible refilling, took six or seven such bottles, sealed them on the spot, made out duplicate receipts that were signed by appellant and the inspectors, left one with her, took the bottles to the Cleveland District Office, which sent them on to Department Chemist Prisk, analysis of proof was completed by him and on December 28, 1961, the inspectors submitted to appellant on the permit premises Citation Notice No. 8A, charging refilling. Prisk also testified that between December 21 and December 26,

1961, he broke the seals on the bottles and analyzed the contents, following the Federal Alcometric Tables. He thus found that all but one bottle were low in proof, opining that most of the bottles indicated a diluent of lower proof but one was low for no known reason. The notice of hearing is dated June 5, 1963.

Before and at the hearing, appellant made two motions. The first was to suppress all evidence on the basis of the *Mapp* case, 376 United States, 643, 6th ed. 2d, 1081, i.e., no search warrant. That case is no support for appellant's motion. (1) If the doctrine of that case is extended to cover situations such as we have here, could so much as "frisk" a suspect; and here it was more than suspect, it was offense. (2) This type of occupation is such that it voluntarily assumes the risk of such inspections and confiscations. (3) Appellant here made no objection at all to the search, inspection and confiscation as did the landlord in the *Mapp* case. (4) Even if appellant falls within the ambit of the *Mapp* case, she, like anyone in this country, may waive any constitutional right she has, state or federal; and that is exactly what appellant did here. (5) This was not a search for one thing and discovery of another as in the *Mapp* case. (6) This was the confiscation of a *Hurless vs. Dept. L. C.*, 73 Ohio Law Abs., 161 (aff'd., 164 Ohio State, 492); not of *Grieb vs. Dept. L. C.*, 153 Ohio State, 77, which came under an entirely different statute and created a situation akin to the *Mapp* case. Let it also be noted that the key words in the statute quoted above are "or possess"; that factor is here admitted. The Board ruled correctly on this motion.

Appellant's second motion is to dismiss because she was not served with a copy of the "Violation Notice" as provided in Regulation No. 61. However, appellant admits service of

"Citation Notice No. 8A, "charging refilling". She offered no difference or distinction between the two notices. This notice was served not more than 48 hours after Prisk completed his analysis. Nor does Regulation 61 mean that the inspectors must identify themselves to the permittee and serve notice on that permittee at one and the same instant. Such a procedure in a case like this is patently impossible; all must await the analysis. The Board ruled correctly on this motion.

The facts being admitted or proven, the order of the Board is affirmed. *Henry's Cafe vs. Board*, 170 Ohio State, 233.

/s/ KENNETH L. SATER,
Judge.

APPEARANCES:
LEONARD STERN,
Attorney For Appellant,
WM. SAXBE, Attorney General,
et al.,
Attorneys For Appellee.

JOURNAL ENTRY

This cause came on to be heard upon the appeal of the appellant from the decision and order of the Liquor Control Commission overruling the motion of appellant to suppress all evidence before the Liquor Control Commission on the basis of the case of *Mapp vs. Ohio*, 367 U. S. 643, 6 L. Ed, 2d 1081 (1961) and from the decision and order of the Liquor Control Commission revoking appellant's Class D-5 permit, and was submitted upon the briefs and oral arguments of counsel and the transcript of testimony.

The Court, being duly advised in the premises, finds that the rulings of the Liquor Control Commission with respect to the said motion of appellant were well taken and should be sustained, and that the decision and order of the Liquor Control Commission revoking appellant's Class D-5 permit is sustained by reliable, probative and substantial evidence in the entire record and that, therefore, said appeal is not well taken and the decision and order of the Liquor Control Commission revoking appellant's Class D-5 permit is well taken and should be sustained.

The Court has been informed that the appellant herein, Betty Solomon, has given oral notice of her intention to appeal this order and judgment to the Court of Appeals for Franklin County, Ohio, and that a written notice of appeal will be filed by appellant herein, in accordance with law, and the appellant herein, has been operating her business under a stay order heretofore granted by the Court of Common Pleas of Franklin County, Ohio, as provided by law. It is, therefore, ordered that the stay order heretofore granted be, and the same hereby is, continued in full force and effect until final adjudication of this cause as provided in Section 119.12 of the Revised Code. The stay order shall cease to be of force in the event that the appellant herein fails to file a written notice of appeal within the time required by law.

It is, therefore, ORDERED, ADJUDGED and DECREED that the rulings of the Liquor Control Commission with respect to appellant's said motion to suppress all the evidence before the Liquor Control Commission on the basis of the *Mapp* case, supra, be, and the same hereby are affirmed; and it is further ORDERED, ADJUDGED and DECREED that the decision and order of the Liquor Control Commis-

sion revoking appellant's Class D-5 permit be, and the same is affirmed.

/s/ KENNETH L. SATER,
Judge.

APPROVED:
/s/ LEONARD J. STERN,
Attorney for Appellant.
/s/ WILLIAM B. SAXBE,
Attorney General,
/s/ J. RICHARD LUMPE,
Assistant Attorney General of Ohio,
Attorneys for Appellee.

APPENDIX D

BEFORE THE LIQUOR CONTROL COMMISSION

Docket No. 2896

Case No. 28878

STATE OF OHIO,
Department of Liquor Control,
219 S. High Street, Columbus, Ohio,
vs.
BETTY SOLOMON, dba Brooksy's Bar,
2031 East 105th Street, Cleveland 6, Ohio,
Cuyahoga County,

Class D-5 Permit, Certificate No. 281178 (6/23/62).
June 20, 1963

This cause came on to be heard on the charge brought against the above permit holder, to-wit—

> "On August 14, 1961, you did possess in and upon the permit premises, intoxicating liquor in an original container which had been diluted, refilled, or partially refilled--in violation of the provisions of the Liquor Control Act."

and said permit holder was duly served with a copy of said charge and notice of the hearing thereon.

And said permit holder, appearing before the Liquor Control Commission to answer said charge, denied the same, and thereupon the matter was submitted to the Liquor Control Commission on the evidence; and said Commission in consideration thereof, finds that the allegations of the Director of Liquor Control are well taken and supported by the evidence and orders the above permit revoked.

It is therefore ordered and adjudged that Class D-5 permit, Certificate No. 281178, be, and the same is hereby revoked, effective at noon July 15, 1963.

It is a condition of this order, however, that if the within Class D-5 permit is renewed by the Director of Liquor Control for the permit year 1963-64 prior to the effective date of the within revocation, it is the order of the Liquor Control Commission that the order of revocation herein shall be applied to the newly issued certificate.

LIQUOR CONTROL COMMISSION—STATE OF OHIO

KENNETH E. THOMAS,
Chairman

BERNARD T. CHUPKA,
Vice Chairman

J. MAYNARD DICKERSON,
Member

All Members Concur
Mailed: 6/27/63
EM

APPENDIX E

BEFORE THE LIQUOR CONTROL COMMISSION

STATE OF OHIO,
DEPARTMENT OF LIQUOR CONTROL,
vs.
BETTY SOLOMON, dba Brooksy's Bar,
2031 East 105th Street, Cleveland 6, Ohio,
Cuyahoga County, Ohio,
Permit Holder.

Docket No. 2896

Case No. 28878

Permit: (Class D-5) 281178
6/23/62

PROCEEDINGS AND TESTIMONY

before Mr. Kenneth E. Thomas, Chairman; Mr. Bernard T. Chupka, Vice Chairman; and Mr. J. Maynard Dickerson, Member, at the Commission Hearing Room, 219 South High Street, Columbus, Ohio, on June 20, 1963.

APPEARANCES:

Mr. Leonard J. Stern, Attorney at Law,
17 South High Street, Columbus, Ohio,
On behalf of the Permit Holder.
Mr. William B. Saxbe, Attorney General of Ohio by
Mr. Robert M. Duncan, Assistant Attorney General of Ohio,
On behalf of the Department of Liquor Control.

Hazel Gibbon reporting.

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Exhibits:

Department's	Offered	Admitted
A, B, C, D, E, F and G (bottles & contents)	10	10

(page 2)

The charge preferred against the said permit holder reads as follows:

> "On August 14, 1961, you did possess in and upon the permit premises, intoxicating liquor in an original container which had been diluted, refilled, or partially refilled—in violation of the provisions of the Liquor Control Act."

Mr. Stern: Mr. Chairman, with reference to Case No. 28878, the refill case, on behalf of the permit holder we enter a plea of Not Guilty, and waive the reading of the citation. I would like, when Mr. Duncan is ready, before any testimony is offered, I would like to make a Motion.

Mr. Thomas: Proceed.

MOTION

Mr. Stern: Mr. Chairman, Members of the Commission, I would like to move that no evidence be introduced in this

particular case, based upon the Motion which we filed two days ago, which the Commission overruled, and we renew the Motion as to the evidence; that the evidence is not procured legally; and we base our (page 3) contention on Case Mapps versus United States, which arose from the case cited in 170 Ohio State, page 427.

The second ground for our Motion is that the permit holder was not served with a copy of the Violation Notice, as provided by Regulation 64.

Mr. Thomas: There isn't any question about Notice of Hearing?

Mr. Stern: No, we waive that also.

Mr. Duncan: Mr. Chairman, I would like to read a stipulation into the record in this matter.

STIPULATION

Mr. Duncan: Let the record show it is stipulated and agreed by and between Counsel for the Permit Holder, Betty Solomon, d.b.a. Brooksy's Bar, and Counsel for the Department of Liquor Control that if Investigators Duffy and Pollock, Agents of the Ohio Department of Liquor Control were called to testify, they would testify as follows:

That on Monday, August 14, 1961, at approximately 1:40 P. M., Eastern Standard Time, Investigators Duffy and Pollock entered (page 4) the premises known as "Brooksy's Bar," and identified themselves to the Permit Holder, Betty Solomon, and informed Betty Solomon that they were going to confiscate some partial four-fifths bottles of spirituous liquor from the back bar, in order that the State Chemist could analyze them for possible refilling. Investigator Duffy proceeded behind the bar, and confiscated the following bottles, which were displayed on the back bar for sale:

One part four-fifths quart Park and Tilford's Whiskey;
One part four-fifths quart Kinsey's Whiskey;
One part four-fifths quart Schenley Reserve Whiskey;
One part four-fifths quart Carstairs White Seal Whiskey;
One part four-fifths quart P. M. Whiskey;
One part four-fifths quart I. W. Harper Whiskey.

Investigator Pollock then sealed each of these bottles while he was on the premises, and made out a duplicate receipt, which was signed by Investigators Duffy and Pollock and the Permit Holder, Betty Solomon. Betty (page 5) Solomon was given one of these receipts, and the Investigators delivered the confiscated evidence to the Cleveland District Office of the Ohio Department of Liquor Control. This delivering was done on the same day, that being August 14, 1961.

State Chemist Howard Prisk, on August 30, 1961, took the above-mentioned bottles of whiskey from the Cleveland District Office in their sealed condition, as above indicated, and delivered this evidence to Columbus himself.

On December 28, 1961, if Investigator Pollock and Investigator Duffy were called to testify, they would state that they returned to the premises, that is Brooksy's Bar, and issued Citation Notice Number 8A 5169, charging refilling, and submitted this citation to Betty Solomon.

Mr. Duncan: That ends the stipulation. I would like to call Howard Prisk.

Mr. Stern: Well, —to save time, we'll admit his qualifications.

Howard Prisk,

of lawful age, called as a witness by the Department, being first duly sworn, testified as follows: (page 6)

Direct Examination

By Mr. Duncan:

Q. Would you state your name, please. A. Howard Prisk.

Q. Mr. Prisk, your qualification as an expert for all purposes here to-day have been stipulated. Calling your attention to a number of bottles which are on the desk—on the table in front of you, and labelled for purposes of identification as "Department's Exhibits A, B, C, D, E, F, and G", I will ask you to look at those and tell us, if you can, when did they first come into your possession, if they did. A. They came into my possession March 30, 1961 at the Cleveland District Office.

Q. What did you do with them after that? A. I put them in my car and delivered them to my laboratory, 33 North Third Street, Columbus, Ohio. They had an accompanying request with them that analysis be made.

Q. Would you examine the record and tell us whether or not you came into possession of them March 30, 1961, or August 30, 1961? A. Beg pardon?

Q. Would you examine your records again and tell us whether or not these bottles came into your possession March 30, 1961 or August 30, 1961? (page 7) A. August 30, 1961, this record shows. The card was wrong.

Q. All right. Thank you, Sir. Now as a basic background to preface some of your other testimony, would you tell us, Mr. Prisk, how did you establish a standard relating to a chemical composition that a bottle of whiskey should contain? How is this done? A. In this particular case, we were concerned with the proof only, and in determining the proof, we removed a portion of the contents of the bottle, and we distilled it over into a volumetric flask, and we took the distillate, and took the specific gravity of the distillate with the chainomatic specific gravity balance, and we arrived at the specific gravity of the distillate. We consulted

the Government Alcometric Tables, and we found how much alcohol is present in the distillate. The per cent by volume, we multiply that by two, and that gives us the proof.

Q. Now the procedure that you have just outlined for us, did you follow that procedure when you analyzed A through G? A. I did.

Q. Calling your attention to the label on each of the bottles before you, known as Department's Exhibits A through G, did each of these bottles indicate what the proof should be? A. Yes, Sir, they did. (page 8)

Q. Now, calling your attention to the Bottle known as Department's Exhibit A, would you tell us what the brand of that whiskey is? A. This is I. W. Harper's Bottled in Bond Bourbon Whiskey.

Q. What proof is that labeled? A. Labeled 100 proof.

Q. What was the result of your analysis on that bottle? A. Found the contents of Department's Exhibit A contained a Bourbon Whiskey, having a proof of 99.66 per cent degrees. That one, I concluded, was satisfactory.

Q. Calling your attention to bottle which was marked as "Department's Exhibit B", would you please indicate what that proof is labeled, and what you found it to be? A. Department's Exhibit B is labeled "Old Overholt Straight Rye Whiskey, 100 Proof." I found the content of State's Exhibit B to contain whiskey having a proof of 86.18 degrees.

Q. Would you please examine Exhibit C and tell us what it is labeled? A. Department's Exhibit C is labeled "Park and Tilford Reserve Whiskey", a Blend, 86 proof; and the (page 9) contents of Department's Exhibit C did contain a blended whiskey having a proof of 75.24 degrees.

Q. Will you tell us what you found regarding Department's Exhibit D? A. Department's Exhibit D is labeled "Schenley Reserve Blended Whiskey, 86 Proof". I found

it to contain a blended whiskey having a proof of 84.90 degrees.

Q. Calling your attention to Exhibit E, and please give us the same information. A. Department's Exhibit E is labeled "P. M. Deluxe Blended Whiskey, 86 Proof." I found the contents to contain a blended whiskey having a proof of 84.2 degrees.

Q. Department's Exhibit F? A. Department's Exhibit F is labeled "Carstairs White Seal American Blended Whiskey, 86 proof". I found the contents of Department's Exhibit F to contain alcohol to the extent of 84.08 degrees proof.

Q. Department's Exhibit G? A. Department's Exhibit G is labeled "Kinsey's Blended Whiskey, 86 Proof." I found Department's Exhibit G to contain a blended whiskey having a proof of 83.48 degrees.

Q. Is it your testimony with the exception of Department's Exhibit A, Department's Exhibits B, C, D, E, F, and G were unsatisfactory in the area of proof. Is that correct? (page 10) A. That is correct, Yes, Sir.

Q. Now, backing up a bit, Mr. Prisk, when you first received the bottles which you have testified to, were they sealed? A. They were sealed, yes, Sir. They bore seals.

Q. Did you break the seals yourself? A. I broke the seals myself.

Q. And what was the date of analysis? A. These were analyzed — the analysis was started December 21, and finished December 26, 1961.

Q. Now the instances that you have testified to, that certain exhibits which have been presented to you have been low in proof, do you have an opinion as to how they became low in proof? A. I have an opinion,—yes.

Q. And what is that opinion, based upon your expert qualification which have been stipulated, what is your opinion? A. Bottle number one was satisfactory. Bottle

Number two was labeled "100 proof", and contained "86.18 degrees."

Q. Mr. Prisk, when you say "two" would you mean "B"? A. "B" was labeled "Old Overholt" 100 Proof. It had 86.18 proof. My opinion is that it was substituted with a whiskey of 86 proof, or the bottle had been diluted so as to (page 11) change the proof from 100 to 86.18. Bottle Number three, "Park and Tilford",—or excuse me, State's Exhibit C, labeled "Park and Tilford", 86 proof,—75.24 proof. It was my opinion that this whiskey had definitely deteriorated in some manner which I couldn't explain. Have no explanation but it has lost 10 proof, through either change or dilution, or through substitution with another whiskey. State's Exhibit D, Schenley Reserve, it has the proof of 84.9, which would indicate it to be one point, or one degree low. The following four bottles would indicate—I should correct myself, and say the following three bottles have a proof of approximately one to one and one-half proof low. My only opinion on this is the bottles, as indicated by the indicia on the bottom, at the time they were confiscated, were relatively new; only had been bottled recently. The only reason I have ever know that would indicate for a drop in the proof is the practice of pulling three-fourths out of the bottle and refilling. That is my opinion. Only that would account for the low proof on the next lowest bottle. The last bottle was labeled 86—it was labeled "Kinsey's 86 proof", and turned out to be 83.48. My opinion would be the same as the others. Maybe they sold four shots out, and maybe refilled it, or diluted it with water. That is my opinion as to why the proof should be low. (page 12)

Q. You mean the last bottle referred to, is known as "Department's Exhibit G." A. That's correct.

Mr. Duncan: No other questions.

Mr. Stern: No questions at this time.

MOTION

Mr. Stern: We move the testimony of this witness be stricken, and base that on the Motion which we related at the beginning of the testimony.

We have no questions.

Mr. Thomas: I don't believe I ruled on the other one. I'll rule on both. Overruled.

Mr. Stern: Exception.

Mr. Duncan: Move that Department's Exhibits A, B, C, D, E, F, and G be admitted into evidence.

Mr. Stern: My objection for the record.

Mr. Thomas: Do you wish to renew your objection?

Mr. Stern: I renew my objection on the same basis, Mr. Chairman.

Mr. Thomas: They will be admitted over objection.

Mr. Stern: Exception.

Mr. Duncan: Department rests. (page 13)

MOTION

Mr. Stern: Mr. Chairman, we renew our Motion at the close of the testimony of State's case; and in addition simply want to state, in behalf of the Permit Holder, that—Number one, the Permit Holder denies, as the Plea of Not Guilty was made at the start of the hearing, that is, she has no knowledge of any refilling or dilution, and that the bottles,—Old Overholt, which is Exhibit B;—Park and Tilford, which is Exhibit C, and Kinsey's, which is Exhibit G, were in the premises in 1958 when she acquired these premises at that time; and the original bottles were on the bar at that time.

With that, we have no testimony to offer.

Mr. Thomas: Anything further?

Mr. Stern: Nothing further.

Mr. Duncan: Nothing further.

Mr. Thomas: You will be notified of the Commission's orders.

CERTIFICATION

I, Hazel Gibbon, Reporter, do hereby certify that the attached transcript is a true, correct and complete stenographic record of the proceedings and testimony, in Case No. 28878 before the Liquor Control Commission on June 20, 1963.

/s/ Hazel Gibbon,
Reporter

BEFORE THE LIQUOR CONTROL COMMISSION
STATE OF OHIO

Docket No. 2896
Case No. 28878
219 S. High Street
Columbus, Ohio
June 18, 1963

BETTY SOLOMON
dba Brooksy's Bar
2031 East 105th Street
Cleveland 6, Ohio
Cuyahoga County
Class D-5 Permit
Certificate No. 281178 (6/23/62)

This cause came on to be heard upon motion of counsel for the permit holder herein for an order directing the Director of Liquor Control to return certain property seized by the agents of the Department of Liquor Control on August 14, 1961, from the premises of the permit holder, and for the suppression of the evidence in the proceeding of the within cause before the Liquor Control Commission; and the Commission, upon consideration thereof, finds the motion not well taken and overrules the same.

Wherefore, it is ordered and adjudged that the within motion be, and the same hereby is, overruled.

LIQUOR CONTROL COMMISSION—STATE OF OHIO
KENNETH E. THOMAS,
Chairman,
BERNARD T. CHUPKA,
Vice Chairman,
J. MAYNARD DICKERSON,
Member.

All Members Concur.
Mailed: 6/19/63
EM

CERTIFICATE OF SERVICE

I, N. Victor Goodman, one of the attorneys of record for the petitioner herein, and a member of the bar of this Court, hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari was personally served upon William B. Saxbe, Attorney General of the State of Ohio, State House Annex, Columbus, Ohio, on the 14. day of March, 1966, and that a copy of said petition was personally served upon James E. Rattan, Assistant Attorney General, 33 North Third Street, Columbus, Ohio, counsel of record for Liquor Control Commission, State of Ohio, Respondent, on the 14 day of March, 1966.

N. Victor Goodman

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No. 1132

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

BETTY SOLOMON,

Petitioner,

vs.

LIQUOR CONTROL COMMISSION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

WILLIAM B. SAXBE,
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Counsel for Respondent,

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MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

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IN THE

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OCTOBER TERM, 1965

No. 1132

BETTY SOLOMON,

Petitioner,

vs.

LIQUOR CONTROL COMMISSION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

QUESTIONS PRESENTED

1. Is Section 4301.68 of the Ohio Revised Code unconstitutionally vague or uncertain as a basis for revoking an Ohio retail liquor permit?

2. May the State of Ohio, consistent with the Constitution of the United States, require, as a condition of the privilege of carrying on the retail liquor business in Ohio, that such liquor permittees hold their licensed permit premises open to inspection, including the taking of samples of liquor stock therefrom to the state laboratory for chemical analysis, by agents of the Ohio Department of Liquor Control?

STATUTES INVOLVED

OHIO REVISED CODE

§ 4301.10 Powers and duties of department of liquor control.

(A) The department of liquor control shall:

(1) Control the traffic in beer and intoxicating liquor in this state, including the manufacture, importation, and sale thereof:

* * * * * * * * *

(4) Enforce Chapters 4301. and 4303. of the Revised Code, and the rules, regulations, and orders of the board, the director, and the penal laws relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquors; and the attorney general, any prosecuting attorney, and any prosecuting officer of a municipal corporation or a police or municipal court, shall at the request of the department prosecute any person charged with the violation of such chapters or of any section of the Revised Code relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquor;

* * * * * * * * *

(6) Inspect, upon demand, the books, accounts, records, memorandums, and place of business of any person subject to Chapters 4301. and 4303. of the Revised Code or the laws relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquor, and the sale of alcohol;

(7) Delegate to any of its agents or employees any power of investigation which the department possesses and the powers of police officers with respect to the enforcement of any of the penal laws relating to beer and to intoxicating liquor, provided that except in his report to the department

or when called upon to testify in any court or proceeding, no such agent or employee shall divulge any information acquired by him with respect to the transactions or the business of any person while acting as such agent or employee, and if he does divulge such information he shall be disqualified forever from acting as agent or in any other capacity under the appointment or employment of the department;

(8) Exercise all other powers expressly or by necessary implication conferred upon the department by Chapters 4301. and 4303. of the Revised Code, and all powers necessary for the exercise or discharge of any power, duty, or function expressly conferred or imposed upon the department by such chapters.

* * * * * * * * *

§ 4301.25 Suspension or revocation of permit.

The board of liquor control may suspend or revoke any permit issued pursuant to Chapters 4301. and 4303. of the Revised Code for the violation of any of the applicable restrictions of such chapters or of any lawful rule or regulation of the board or other sufficient cause, and for the following causes:

(A) For conviction of the holder or his agent or employee for violating a section of Chapters 4301. and 4303. of the Revised Code or for a felony;

(B) For making any false material statement in an application for a permit;

(C) For assigning, transferring, or pledging a permit contrary to the rules and regulations of the board;

(D) For selling or promising to sell beer or intoxicating liquor to a wholesale or retail dealer who is not the holder of a proper permit at the time of the sale or promise;

(E) For failure of the holder of a permit to pay an excise

tax together with any penalities imposed by the law relating thereto and for violation of any rule or regulation of the department of taxation in pursuance thereof.

* * * * * * * * *

§ 4301.68 Prohibition against sale or possession of diluted liquor and refilled containers.

No person shall sell, offer for sale, or possess intoxicating liquor in any original container which has been diluted, refilled, or partly refilled.

* * * * * * * * *

STATEMENT OF THE CASE

This case originated with a charge before the Ohio Liquor Control Commission that Petitioner had possessed upon her licensed liquor permit premises intoxicating liquor in original containers which had been diluted, refilled, or partially refilled in violation of Section 4301.68 of the Ohio Revised Code. Petitioner made timely objection to the admission before the Commission of certain evidence and testimony relative to several allegedly refilled whiskey bottles (Petition, Appendix E, pp. 31a, 38a) which had been taken without objection from Petitioner's permit premises by state liquor investigators for chemical analysis. Petitioner's motions raising this objection were overruled (Petition, Appendix E, pp. 38a, 40a) and, upon an affirmative finding as to the violation alleged, the Commission ordered Petitioner's Ohio liquor permit revoked.

Petitioner thereafter prosecuted an appeal to the Court of Common Pleas of Franklin County which affirmed the order of the Liquor Control Commission (Petition, Appendix C). On further appeal to the Court of Appeals of Franklin County, however, that court, by a two to one majority, ordered the Liquor Control Commission reversed (Petition, Appendix B). The latter decision was based upon a finding

that the state liquor agents did not have authority under Ohio law to take the bottles of intoxicating liquor, constituting Exhibits A through G, from Petitioner's permit premises (Petition, Appendix B, p. 22a).

Respondent then prosecuted an appeal to the Supreme Court of Ohio, and in a decision announced December 1, 1965, that court unanimously reversed the judgment of the Court of Appeals and affirmed that of the Court of Common Pleas, thereby in effect affirming the order of the Liquor Control Commission revoking Petitioner's Ohio liquor permit (Petition, Appendix A). In so ruling the court held that Section 4301.68, supra, was plain and unambiguous and that, contrary to the finding of the Court of Appeals, the Ohio Liquor Control Act did authorize the removal of bottled intoxicants from a liquor permit premises by state liquor agents for examination and testing in a state laboratory.

Rehearing was denied by the Supreme Court of Ohio, and Petitioner then timely filed the present petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

At the outset, it should be clearly understood that the order of the Ohio Liquor Control Commission, out of which this case arises, deals with nothing but the privilege of conducting the retail liquor business in the State of Ohio under an Ohio liquor permit. The Ohio Liquor Control Commission has power to deal with nothing more (Section 4301.25, Ohio Revised Code); it did not, and could not, order Petitioner put in jail; it did not, and could not, order her fined. The Liquor Control Commission ordered only that Petitioner's privilege of carrying on the retail liquor business in Ohio be revoked; and in the context of the present petition she must now contend, either that the

order itself is in violation of her rights under the United States Constitution, or that the order was obtained in violation of such rights. Beyond those two contentions no federal question of any kind can be presented.

The Ohio Liquor Control Commission is authorized by Section 4301.25, supra, to revoke or suspend Ohio liquor permits for, among others, "violation of any applicable restriction of Chapter 4301." of the Ohio Revised Code. Section 4301.68 of the Ohio Revised Code clearly contains such an applicable restriction, and upon a finding that Petitioner had violated such restriction the Commission ordered her Ohio liquor permit revoked.

1. Section 4301.68 of the Ohio Revised Code is not unconstitutionally vague or uncertain.

Petitioner contends that Section 4301.68, supra, is so vague, indefinite, and uncertain as to deprive her of her rights of due process under the Fourteenth Amendment to the United States Constitution. Since under Ohio law a liquor permit is neither life, liberty, nor property (*State, ex rel. Zugravu v. O'brien*, 130 Ohio St., 23 (1935)), it might be doubted that due process requirements of definiteness and certainty necessarily apply in this case. Assuming for the purposes of argument that they do, however, Petitioner's contention is still without merit. On its face the statute in question is neither vague, nor indefinite, nor uncertain. Far from requiring a man of common intelligence to guess at its meaning, it takes a man of uncommon intelligence and determination to conjure up even an unsubstantial question about this statute.

Section 4301.68, Ohio Revised Code, provides:

> "No person shall sell, offer for sale or possess intoxicating liquor in any original container which has been diluted, refilled, or partially refilled."

Whatever else may be said about this language, it must at

least be deemed to clearly convey that possession of whiskey bottles containing intoxicating liquor, other than that indicated by the label in undiluted form, by an Ohio liquor permit holder upon her licensed premises, will subject that permit holder to the risk of having her liquor permit suspended or revoked by the Liquor Control Commission under authority of Section 4301.25, supra. The most that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . ." (*United States v. Petrillo,* 332 U. S. 1, 7, 8 (1947), *Roth v. United States,* 354 U. S. 476, 491 (1957)) As to the Petitioner, certainly that much is conveyed by the statutory language here in question.

The arguments in the Petition based on the fact that violation of Section 4301.68, supra, is also a misdemeanor and the fact that the prohibition of the section might be applied to every person in the State of Ohio are inapposite. No criminal penalty is being imposed here, and the statute is being applied only to one of a special and limited class of persons, viz., Ohio liquor permit holders. The Court does not "decide any constitutional question except with reference to the particular facts to which it is to be applied . . ." (*Alabama State Federation of Labor v. McAdory,* 325 U. S. 450, 461 (1945)). The facts with reference to which the Constitutional question would be decided here are revocation of a state liquor permit for possession by the permit holder of refilled whiskey bottles on the liquor permit premises; and, as to that set of facts, there is no lack of certainty in the statute whatever.

2. The State of Ohio may, consistent with the Constitution of the United States, require, as a condition of the privilege of carrying on the retail liquor business in the

state, that such liquor permittees hold their licensed permit premises open to the type of inspection carried out in this case.

There is in the Petition a concerted effort to convince the court that the question of whether the exclusionary evidence rule of *Mapp v. Ohio,* 367 U. S. 643 (1961), is applicable to state administrative proceedings is presented by this case. In fact and despite Petitioner's use of phrases such as "highhanded manner", "official lawlessness", and "flagrant abuse", that question is not presented here.

The key portion of the holding of the Ohio Supreme Court on this point is contained in Syllabus No. 4 to the court's opinion.

> "One who applies for and is issued a permit to sell intoxicating beverages thereby subjects himself to the provisions of the Liquor Control Act and assents to the reasonably exercised inspection and examination by the agents of the Department of Liquor Control of his permit premises, including bottled intoxicants which he possesses and offers for sale thereon, and a removal of bottles of intoxicants from the permit premises by such agents for examination and testing in a state laboratory to determine whether they comply with lawful requirements is authorized by the provisions of the Liquor Control Act." (4 Ohio St. 2d 31)

That is the highest court of Ohio speaking as to the meaning of an Ohio statute, the Ohio Liquor Control Act and especially Section 4301.10 of the Ohio Revised Code (see Syllabus No. 2). Such construction of the Ohio statute is binding upon this Court (*United States v. Burnison,* 339 U. S. 87 (1950); *Oklahoma Tax Commission v. Texas Company,* 336 U. S. 342 (1949); *Kingsley International Pictures Corp. v. Regents of University of New York State,* 360 U. S. 684 (1959); *National Asso. for Advancement of Colored People v. Button,* 371 U. S. 415 (1963)). In effect, the

Ohio Supreme Court has said that it is a statutory condition of holding an Ohio liquor permit that the permittee agree to reasonable inspection and examination of his permit premises, including the removal of bottled intoxicants therefrom for testing in the state laboratory which was carried out in this case. Unless there is a substantial question whether Ohio may, consistent with the Constitution of the United States, have such a law, there is nothing for this Court to review; for, with the exception of the insubstantial one discussed above, Petitioner's case presents no other question.

It has long been settled that ". . . on account of their well known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a state has the power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guaranties of the 14th Amendment." (*Crane v. Campbell,* 245 U. S. 305, 307 (1917)). "Having the power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants . . ." a state may permit these things only under definitely prescribed conditions. "The greater power includes the less . . . The state may protect her people against evil incident to intoxicants . . . and may exercise large discretion as to the means employed." (*Ziffrin v. Reeves,* 308 U. S. 133, 138, 139 (1939))

In the present case the State of Ohio has deemed it in the interest of her people to require that those places licensed to sell intoxicants be open to the type of inspection carried out here. The Supreme Court of Ohio has so interpreted the Ohio law. Petitioner argues strenuously that this is an invasion of her Constitutional rights, but it is not. She has no Constitutional right to carry on the liquor business

(*Giozza v. Tiernan*, 148 U. S. 657 (1893)); she can, therefore, hardly have a Constitutional right to carry it on free from inspection.

Nothing is in jeopardy here but the privilege of Petitioner's Ohio liquor permit—not her life, nor her liberty, nor her property. Furthermore, the right of inspection which the state acquired when Petitioner obtained her permit in no way infringes her Constitutional rights, for it extends only to Petitioner's licensed permit premises and the things thereon—not to her home, nor her car, nor her person. The present case deals with nothing more than the privileges of a state liquor license; and the statutory right of inspection, here producing the evidence upon which that privilege was terminated, extended no further than the site where the privilege was then being exercised. Such a state of facts discloses no invasion of the Constitutional rights of Petitioner.

CONCLUSION

Petitioner's case presents no federal question of substance for review by this Court. The writ prayed for should, therefore, be denied.

Respectfully submitted,

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